

OCT 05 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY G. DIPACE,

Defendant - Appellant.

No. 04-10098

D.C. No. CR-99-00099-DAE

MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Submitted October 1, 2004**

Before: SCHROEDER, Chief Judge, D. NELSON and REINHARDT, Circuit Judges.

This matter is before this panel after resentencing. In this appeal, Anthony G. DiPace (“DiPace”) contends that the district court did not follow our mandate when it resentenced DiPace to 30 months. This contention is without merit. The district court

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

followed our mandate and made findings fully adequate under then controlling law.

In support of his July 26, 2004 motion for bail pending appeal, DiPace contends that his sentence was imposed by the district court in violation of subsequently announced principles in *Blakely v. Washington*, — U.S. — , 124 S. Ct. 2531 (2004) and *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004). Appellant appears to be correct that he has already served that portion of his sentence unaffected by these decisions. Where the portion of the sentence that is clearly unaffected by *Blakely* and *Ameline* has expired or will expire shortly, we remand the case to the district court for whatever action it determines to be proper under the circumstances. Among the options available to the district court, within the exercise of its discretion, would be to reconsider its sentence or to stay further proceedings pending the outcome of the Supreme Court in *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-104), and *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-105), with or without granting bail to the defendant.

Accordingly, DiPace's sentence is **REMANDED** for such further proceedings as the district court deems appropriate.

The mandate shall issue forthwith.